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No. 696

IN THE

Supreme Court of the United States

October Term, 1967

ALPHA ENTERPRISES, INC., *Petitioner*

v.

CITY OF HOUSTON, ET AL., *Respondents*

BRIEF OF RESPONDENTS
In Opposition To Petition For Writ of Certiorari

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BRIEF OF RESPONDENTS
In Opposition To Petition For Writ of Certiorari

Respondents, City of Houston, Texas, W. O. Hunter, Fire Chief of the City of Houston, and R. C. Bredehoeft, Fire Marshal of the City of Houston, file this opposition to the Petition for Writ of Certiorari filed by Petitioner to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTION PRESENTED

Respondents submit that there is but one question here presented:

I.

In 1953, there was an explosion of a warehouse storing fireworks within the City of Houston, Texas, resulting

in four deaths, ninety-six injuries, and untold property damage. Shortly thereafter, and in response thereto, the City Council of the City of Houston enacted its Ordinance §8941 which prohibited the storage of fireworks within the City of Houston. Is this ordinance unconstitutional?

STATEMENT OF THE CASE

On June 5, 1953, the warehouse of Alco Fireworks & Specialty Co., situated on Rosine Street, Houston, Texas, blew up. The force of the explosion caused a house in the neighborhood to be demolished, killing the two adults and two children who were in it. Ninety-six other persons suffered injuries of varying degree. Several blocks around the warehouse were flattened.[1]

An investigation was immediately instituted by Hon. Roy Hofheinz, then Mayor of the City of Houston, and as a result of the investigation it was determined that the holocaust was caused by the explosion of fireworks in the Alco Fireworks & Specialty Co. warehouse. As a result, the ordinance [City of Houston Ordinance §8941] whose constitutionality is here attacked was enacted.

---

1. The sound of the explosion was reported to have been heard as far as fifteen miles away. Immediately after the explosion, a mushroom shaped cloud of white smoke rose above the scene, and within about two minutes black smoke began to rise and mix with the white cloud. Sky rockets and flares caused numerous flashes of fire within the cloud, and people nearby could hear the continuous popping of fireworks. Damage was consistently heavy to all but the strongest structures within a radius of almost one-fourth mile from "ground zero". Thirty houses were damaged beyond repair. At least one building a distance of one-half mile received major structural damage. A Sears-Roebuck Co. warehouse received major structural damage to the walls facing the point of the explosion. Many Houston residents thought that an atomic bomb had exploded. Lewis M. Killiar, National Academy of Sciences, Committee on Disaster Studies, Disaster Study No. 2, Pub. No. 391, *A Study of Response to the Houston, Texas, Fireworks Explosion.*

Appendix "A", pages 19-22, infra, contains the testimony of Mr. Alcus Greer, then and now an arson investigator of the City of Houston fire department. This testimony is to the effect that the fire department investigation determined the tragedy was caused by the explosion of fireworks in the warehouse, Appendix "B", pages 23-26, infra, contains the testimony of Hon. Will G. Sears, who was City Attorney in 1953. Mr. Sears described the devastation he found on the scene and also testified that as City Attorney he was directed by the Mayor to draft Ordinance §8941, and that said Ordinance was passed by the City Council of the City of Houston as a result of the explosion.

ARGUMENT

I.

The enforcement of City of Houston Ordinance §8941, prohibiting the storage of fireworks within its corporate limits, would not be an unconstitutional interference with interstate commerce.

The City of Houston, the most populous city in Texas, and the sixth largest in the nation, after having been subjected to a holocaust in which four of its citizens were killed outright, and ninety-six others were injured as a result of an explosion of a fireworks warehouse, passed an ordinance forbidding the storage of fireworks within its corporate limits. As the fireworks were imported from out of state, and as some of them were later sold and shipped out of state, Petitioner has taken the position that the enforcement of this ordinance would constitute an unconstitutional interference with Interstate Commerce. This position is untenable.

In 1951, in *Breard v. City of Alexandria,* 341 U.S. 813 (1951), the United States Supreme Court repeated the fundamental proposition of constitutional law that:

> "Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power." 341 U.S. 634.

And, in 1960, in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), holding a city ordinance valid which was aimed at air pollution, the United States Supreme Court stated:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . .' never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country . . ." 362 U.S. 443.

Thus, local regulations are allowed to stand if they are not an unreasonable burden upon interstate commerce and the local nature of the activity and the obvious state or local interest outweighs the national interest as envisioned by the commerce clause of the United States Constitution.

The question raised here was resolved in *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (1919). In that case the United States Supreme Court was required to determine the validity of a municipal ordinance forbidding

the storage of petroleum, gasoline, etc. within three hundred feet of any dwelling house. The plaintiff oil company, much like the Petitioner here, contended that the tanks were necessary for its business and that it "knows of no available place in the city where the tanks could be put and oil stored without violating the ordinance, . . . and that the enforcement of it will deprive the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States."

The United States Supreme Court, speaking through Mr. Justice Holmes, held:

> ". . . A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States . . . The power 'is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good . . ." 248 U.S. 498.

A similar question was before the Illinois Appellate Court in *Edward R. Bacon Grain Co. v. City of Chicago*, 59 N.E.2d 689 (Ill. App. 1945), where the Court was called upon to determine the validity of a City of Chicago ordinance regulating grain storage elevators which was enacted by the City "as a protection against the extra fire and explosion hazard arising from the operation of a grain elevator due to dust explosions . . ." Refusing to agree that this ordinance was a burden on interstate commerce and thus unconstitutional, the Illinois Court said:

> ". . . The principle is thoroughly established that the exercise by the state of its police power, which would

be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

* * * *

". . . The federal control of interstate commerce does not preclude local police regulations covering matters as to which Congress has not acted, . . . it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress . . . *The ordinance before us is a police regulation of strictly a local character, intended to protect the city, its people and property from fire and explosion arising out of the maintenance and operation of warehouses.* It applies alike to all warehouse operators, whether engaged in intrastate or interstate commerce. *It is not in conflict with the commerce clause of the constitution or any federal legislation or regulation.* (Emphasis added). 59 N.E.2d 693-694.

Petitioner has asserted that the case of *City of Fort Worth v. Atlas Enterprises*, 311 S.W.2d 922 (Tex. Civ. App. 1958, error ref. n.r.e.), is authority for the proposition that the Texas Courts hold a City Ordinance such as that challenged by this petition is an unconstitutional burden on Interstate Commerce. This is not a correct interpretation of that case which dealt with a Fort Worth ordinance prohibiting the storage, use, and *transportation* of fireworks within the City of Fort Worth. Atlas Enterprises, in the course of interstate commerce, transported fireworks from without the city, *through the city*, to points beyond. The narrow question presented, therefore, was whether *transportation* could be prohibited. The Fort

Worth Court of Civil Appeals distinguished *Atlas* from its previous holding in *Stoughton v. City of Fort Worth*, 277 S.W.2d 150 (Civ. App. 1955), by pointing out that *Stoughton* went no further than to hold valid the portion of the ordinance prohibiting *storage* within the City of Fort Worth.

Although thus furnished with the opportunity to do so, the Court did not overrule *Stoughton*, but held "the judgment must be affirmed in any event due to the invalidity of the ordinance in so far as it purports to prohibit the *movement* of fireworks in intrastate and interstate commerce."

In *Atlas* the Court further pointed out that "Though challenged, the City produced no evidence in demonstration of any prior injury resultant to either its own citizens or their property, or to citizens of other municipalities or their property through such *transport*." (Emphasis added). In the case at bar, we are concerned with the question of *storage* as opposed to *transportation* and the record contains evidence of an explosion of fireworks, stored within the City of Houston by the very same man who now owns and controls Petitioner corporation, in which explosion *four citizens of Houston were killed, ninety-six injured*, and an untold amount of property was damaged and destroyed. Thus, if *Atlas* can be construed to hold that disastrous experience is a factor to be considered in determining the validity vel non of the ordinance, Houston has that experience, recorded in blood, and now only seeks to be allowed to prevent other Houston citizens from being killed or injured in the same manner.

The rule can be easily summarized and concluded that: "Every state police statute necessarily will affect interstate

commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce." *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 351 (1939); that "Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, State action is struck down. If the activity is one of predominantly local interest, State action is sustained. More accurately, the question is whether the State interest is outweighed by a national interest in the unhampered operation of interstate commerce." *People of State of California v. Zook*, 336 U.S. 725, 728 (1949). The "local" interest here put onto the balance is the prevention of a recurrence of the 1953 holocaust. With their notorious record for maiming and blinding children, and causing destructive fires, what social, economic, or political benefits do fireworks offer to society that would justify subjecting the people of Houston to the risk involved here? What is there about the transportation of fireworks of such transcending national importance that would outweigh the rights of the people of the City of Houston herein? It is submitted there is none, and that the very incidental manner in which interstate commerce might be affected here would not take the matter out of the sphere of local control; especially is this so when it is not shown or even contended that interstate commerce, vis-a-vis intrastate commerce, is discriminated against.

Respondents submit, therefore, that City of Houston Ordinance §8941 does not impose an unlawful or unconstitutional burden on interstate commerce.

II.

The United States has not entered the field of fireworks regulation to such an extent that the City of Houston, Texas, may not lawfully enact an ordinance prohibiting the storage of fireworks within its corporate limits after four of its citizens were killed and ninety-six others were injured as a result of a fireworks warehouse explosion.

Respondent submits that the Congress has occupied the field of fireworks regulation to the limited extent of prescribing the manner in which *fireworks and other dangerous substances* may be shipped in interstate commerce, and only to that extent.

In the Code of Federal Regulations, Title 49, Ch. 1, #71-79, the rules governing the shipment and packaging of fireworks in interstate commerce are set out. They are rather limited in scope and intended effect, however, as stated by #73.1 thereof:

> "(a) To promote the uniform enforcement of law and to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles by common carriers engaged in interstate or foreign commerce, the regulations in parts 71-79 of this chapter are prescribed to define these articles for transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment by rail freight, rail express, rail baggage, highway, or by carrier by water. It is the duty of each such shipper to make the prescribed regulations effective and to thoroughly instruct employees in relation thereto."

The only other instance in which Respondents have been able to discover any Federal Action in the field of Fire-

works legislation has been in the Federal "Child Protection Act of 1966,"[2] whereby the Federal "Hazardous Substances Labeling Act"[3] was amended by adding, as Section 3 thereof, a paragraph banning as hazardous substances, toys or other articles intended for use by children which contain a hazardous substance. Fireworks are exempted from this ban only to the extent that the Secretary of Commerce "determines that such articles can be adequately labeled to protect the purchasers and users thereof," hardly an enthusiastic Congressional approval.

It is submitted that the Federal Statute and the Federal Regulations above referred to do not in any manner indicate Congressional intent to invade the field so as to prevent the City of Houston from responding to the need for action so traumatically demonstrated by the 1953 fireworks explosion and prohibiting the storage of that dangerous and explosive substance, — which serves no useful social, economic, or political purpose, — within its corporate limits.

Very analogous is *Double-Eagle Lubricants, Inc. v. The State of Texas,* 248 F. Supp. 515 (U.S.D.C., N.D., Tex. 1965). A Federal Trade Commission Regulation[4] declared it to be an unfair and deceptive practice to fail to disclose on the panel of its container the fact that a lubricating oil has been made from previously used oil. The Court held that this Regulation did not so preempt the field as to prohibit the State of Texas from enforcing its own statute[5] requiring reconditioned lubricating oil to be sold

2. Public Law 89-756, 98th Congress, S. 3298, Nov. 3, 1966.

3. 15 U.S.C.A. 1261-1273.

4. 16 Code of Federal Regulations, 406.1, et seq.

5. Art. 1106b, V.A.P.C.

in containers with such disclosure on both the front and back thereof. After reciting, as a predicate, certain fundamental principles of Constitutional law, such as the rule that preemption will not be merely presumed, Judge Hughes held:

> "Since the purpose of the Texas statutes in requiring reconditioned motor oil to be labeled as such is to protect the safety and property of the public and to prevent a deception as to the nature and quality of the product the statute is within the police power of the State. *While the law incidentally affects interstate commerce, it does not discriminate against such commerce and is reasonable in its requirements.*
>
> "It is clear that Article 1106(b) Vernon's Annotated Penal Code is a valid exercise of the state's police power, and since the Federal government has not preempted the field to the exclusion of the states, the Texas statute is valid as applied to Double-Eagle." (Emphasis Added). 248 F. Supp. 519.

If, by the wildest stretch of the imagination, Interstate Commerce shipping regulations could be classified as a license, "we are far beyond the time when, if ever, 'license' per se was a condemnation of state regulation of interstate business done within the state's borders." *Robertson v. People of State of California,* 328 U.S. 440, 458 (U.S. Sup. 1946).

It is submitted, therefore, that City of Houston Ordinance §8946 was enacted for the purpose of protecting the citizens of Houston, Texas from the dangers of explosions of fireworks stored in warehouses in this populous city, while the Federal regulations merely prescribe the methods for packaging, shipping, and classifying *"explosives and other dangerous articles,"* ergo, the Congress has

not preempted the field to the exclusion of the States and Municipalities.

III.

The threatened seizure and confiscation of Petitioner's fireworks in the event they were not removed from the City of Houston would not constitute a "taking" of property as prohibited by the Fifth Amendment of the United States Constitution.

As stated many times beforehand, the purpose of City of Houston Ordinance §8941 was to keep fireworks from being stored within the City of Houston. As an incident to the enforcement of the ordinance, *if the Petitioner did not remove the fireworks* [see page 5 of Petitioner's Petition for Writ of Certiorari], the City stated that it would exercise its rights under the ordinance to seize and destroy them. Petitioner had its option to avoid this loss by taking the explosives out of the City.

Assuming the ordinance to be valid otherwise, would it be rendered ineffective by the mere refusal of the Petitioner to remove the fireworks unless paid therefor? Would this impasse prevent the enforcement of the law? No.

It has long been settled that forfeiture of property used in violation of law is not a denial of due process or an unconstitutional "taking" of property. *Van Oster v. State of Kansas*, 272 U.S. 465 (1926); *United States v. One 1961 Cadillac Hardtop Automobile*, etc., 207 F. Supp. 693 (U.S.D.C., E.D., Tenn. 1962).

Texas law is the same. In a fireworks storage case, *Cannon v. City of Dallas*, 263 S.W.2d 288 (Tex.Civ.App. 1953, error ref. n.r.e.) it was held:

> "The distinction between cases involving right of eminent domain or where the municipal corporation appropriates property, and where the use of property is restricted or prohibited must be kept in mind. It has been held that police power permits actual destruction of property where public welfare demands. In such cases the city does not affirmatively benefit, but merely prevents or seeks to prevent some type of harm or nuisance to its citizens, and the loss by regulation or destruction does not enrich anyone, as is the case where property is taken for public use and not because it or its use offends. The power to protect by regulation cannot be and is not burdened with the duty of compensating the aggrieved."

It is submitted, therefore there has been no present or threatened violation of the Fifth Amendment to the United States Constitution.

IV.

The holding of the court below was in harmony and consistent with the statutes and case law of the State of Texas.

Some time prior to the year 1940, the City of Dallas enacted its City Ordinance §3003 which, among other things, prohibited the sale and/or possession of fireworks of any kind in the City. A conviction under this ordinance was affirmed by the Texas Court of Criminal Appeals in *Ex parte Clark*, 140 S.W.2d 854 (Tex Cr. App. 1940), which held that fireworks "constitutes a menace to the life, limb and health to the users and their associates, increases the hazard and loss by fires, and constitutes a common public nuisance, which should be prohibited by law." The Court further held: "We think this a proper exercise of its police power in thus attempting to safeguard

the security, the peace, the lives, the health and the prosperity of its inhabitants."

In *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.) the same Dallas ordinance[6] prohibiting the storage and/or sale of fireworks was upheld.

As previously recited, the City of Houston, Texas, suffered a holocaust in 1953 in which four of its citizen were killed, ninety-six wounded, and in which untold property damage and devastation was wreaked. Shortly after, *and because of,* this explosion, the City Council of the City of Houston enacted Ordinance §8941 which, inter alia, prohibited the storage of fireworks within the city. Shortly thereafter a conviction under this ordinance was upheld in *Treadgill v. State,* 275 S.W.2d 658 (Tex. Cr. App. 1954). The Court held:

> "It appears that it is now definitely settled . . . that fireworks constitute such danger to the public health and safety as to constitute them a nuisance . . ."

A City of Fort Worth ordinance prohibiting the sale and/or storage of fireworks within that city was upheld in *Stoughton v. City of Fort Worth,* 277 S.W.2d 150 (Tex. Civ. App. 1955):

> "Without doubting the power of a court to strike down a city council's definition of a nuisance when the act or condition so denounced does not tend to be injurious to public good, we may not do so when the act or condition sought to be prevented is almost if not quite universally held to be inherently dangerous and to constitute a hazard to property and 'a menace to the life, limb and health'."

This same Fort Worth ordinance was upheld in *Parker v. City of Fort Worth*, 281 S.W.2d 721 (Tex. Civ. App. 1955).

A city ordinance is presumed to be valid unless it be proved that by enacting it the governing body of the municipality was acting in an arbitrary and unreasonable manner, and clearly in abuse of its power, *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945 (Tex. Sup. 1949). Also, the burden of proving such arbitrary or capricious actions is upon the party so attacking the ordinance, *City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18 (Tex.Sup. 1948).

It goes without saying that where, less than a month before, the City of Houston had experienced a devastating, deadly, holocaust in which four of its citizens were killed, ninety-six others wounded, and where its citizens suffered millions of dollars worth of property damage, the City Council of the City of Houston did not act in an arbitrary, capricious, or fraudulent manner in seeking to prohibit a recurrence of such a tragedy by forbidding the storage of fireworks within the city. The fact that Mr. Cohen and other dealers in death, fire and destruction may lose money by the prohibition does not, in Respondents' opinion meet the burden of proof cast upon Petitioner to show that the action was arbitrary, capricious or fraudulent.

Persuasive of the fact that such action is not arbitrary, etc., is the existence of many similar ordinances in the major cities of the United States, listed in Appendix "C" of this Brief, at page 27 hereof.

Respondents submit, at this point, that the City of Houston ordinance being attacked is valid unless Art. 1725 V.A.P.C. makes it otherwise.

Petitioner contended that, although the ordinance under attack here may have been a leigitimate exercise of the police power at the time the Court of Criminal Appeals declared it to be so in *Treadgill v. State*, 275 S.W.2d 658 (Tex. Cr. App. 1954), the subsequently enacted Art. 1725, V.A.P.C. preempted the field, rendering the quondam lawful ordinance invalid. Art. 1725, V.A.P.C. is set forth in its entirety in Appendix "D" of Petitioner's Petition for Writ of Certiorari, at pages 35-48 thereof.

As in other areas of statutory construction, the Courts will not seek to find a conflict between an ordinance and a statute where one does not exist, and the two will be reconciled if it can be done wihout acting contrary to the intent of the Legislature in enacting the statute. Therefore, to determine whether there has been a preemption—whether the Legislature intended to occupy the field of fireworks regulation exclusively—the first place to start looking is the statute itself. Respondents submit that Section 14 of Art. 1725, V.A.P.C. definitely shows that not only is there no conflict, but the Legislature definitely intended for such ordinances as that under attack here to remain in full force and effect. That section is as follows:

"Repealer"

> "Sec. 14. Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be

> construed to limit or restrict the powers of cities, towns or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further, regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned Title shall remain in full force and effect until thereafter amended by such city."

We must remember that prior to the enactment of Art. 1725, V.A.P.C. which included quoted Section 14, the very ordinance under attack in the case at bar had been upheld in *Treadgill v. State,* 275 S.W.2d 658 (Tex. Civ. App. 1954), and similar ordinances of the cities of Dallas and Fort Worth were approved in *Ex Parte Clark,* 140 S.W.2d 854 (Tex. Cr. App. 1940), *Cannon v. City of Dallas,* 263 S.W.2d 288 (Tex. Civ. App. 1953, error ref. n.r.e.), *Stoughton v. City of Fort Worth,* 277 S.W.2d 150 (Tex. Civ. App. 1955), and *Parker v. City of Fort Worth,* 281 S.W.2d 721 (Tex. Civ. App. 1955). "The legislature must be presumed to have been cognizant of the existing decisions," *Koy v. Schneider,* 110 Tex. 369, 221 S.W. 880 (Tex. Su[illegible]20), *Gabbert v. City of Brownwood,* 176 S.W.2d [illegible] (Tex. Civ. App. 1943, error ref). Thus, the conclusion is inescapable that the Legislature did not intend to repeal City of Houston Ordinance §8941 by Art. 1725 V.A.P.C.—else, why was Section 14 of the statute included? "If Parliament does not mean what it says, it must say so."

It is submitted, therefore, that city of Houston Ordinance §8941 has itself, prior to the case at bar, been held valid by the Courts of Texas (as have similar ordinances of other Texas cities) and is still valid.

CONCLUSION

WHEREFORE, Respondents pray that Petitioner's Petition for Writ of Certiorari should be in all things denied.

Submitted this 1st day of November, 1967.

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari has been served upon Presley E. Werlein, Jr., 1350 Esperson Building, Houston, Texas 77002, Charles E. Easterling, 1301 South Coast Building, Houston, Texas 77002, F. Joseph Donohue, Judiciary Square, 503 D. Street, N.W., Washington, D.C. 20001, by placing same in the United States mail, postage prepaid, on this 1st day of November, 1967.

Homer T. Bouldin
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City of Houston
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APPENDIX "A"

TESTIMONY OF ALCUS GREER, CITY OF HOUSTON ARSON INVESTIGATOR, REGARDING THE ALCO FIREWORKS EXPLOSION AND ITS CAUSES.

ALCUS GREER,

called as a witness on behalf of the Defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Rollins:

Q. Will you state your name, please, to the Judge?
A. Alcus Greer.
Q. And what is your job, Mr. Greer?
A. I am an arson investigator for the Houston Fire Department.
Q. How long have you been with the Houston Fire Department?
A. Since October of 1939.
Q. And specifically on June the 5th, 1953, were you on duty with the Houston Fire Department in the afternoon?
A. Yes, sir, I was.
Q. Do you remember an explosion in the west part of the city at that time?
A. I do.
Q. Where were you at the time that you first became aware of that explosion?
A. In the rear of the old County Jail at the foot of Capitol Avenue.
Q. What were you doing there?
A. Taking a prisoner out of jail to the Fire Department Headquarters at 401 Caroline.

Q. What did you do then?

A. We saw a mushroom-type cloud rising from the area where the explosion occurred and we realized that it was a major fire and we proceded immediately to that location.

Q. You even took your prisoner with you?

A. Yes, sir.

Q. And did you hear anything before you observed this cloud?

A. Yes, sir, we did and it was a noise loud enough to call our attention to the fact that there was some type of explosion, and we determined the location off of Waugh Drive.

Q. Tell us how that cloud looked.

A. At the time that we first saw it, it was a rising cloud and appeared roughly to be about the—well, considerably smaller than the ones that I have seen on TV of the atom bomb explosion.

Q. Then you went to the area where the explosion was?

A. Yes, sir.

Q. Specifically where was it?

A. On Rosine Street, one block west of Waugh Drive, in about the 1200 block.

Q. And what did you find or observe out there?

A. We parked about a block from the location where the explosion occurred as we did not know the exact location at that time, Harry Foster, my partner who was with me at the time, and myself determined that extensive damage had been done to stuctures for one and a half to two blocks away from the scene of the center of the explosion, and there was a building burning as I recall now, of course, that has been some 13 years ago, but there was a structure on Waugh Drive on fire and we walked about a block or a block and a

half to the location where the explosion had occurred and found extensive damage in the center of a block area there, which as I recall, I think was around Rosine and Rochow and Clay, but there were a number of structures that were badly damaged and there were several apartments on Clay where most of the rear of the structure had been demolished by the blast, and houses to the west of the explosion that were totally destroyed.

Q. All right. In June, 1953, were you an arson investigator?

A. Yes, sir.

Q. As part of your duties did you make a study of that to determine the cause?

A. Yes, sir.

Q. And what, in your—you did make such a study?

A. Yes, sir.

Q. And what, in your opinion, was the cause of that explosion?

A. The blast occurred in the structure located and sitting off Rosine Street, not in the center but in the direction of the center of the block; the building where the explosion occurred, it was totally gone, no evidence of anything, and there was no question that at that immediate location, and it was determined by us as being a fireworks explosion.

Q. In your further investigation did you determine any people that were killed or injured—

MR. WERLEIN: Your Honor, we object. It is irrelevant and immaterial to this suit.

THE COURT: Overruled.

A. There were four deaths involved.

Q. And aside from that, how many injuries?
A. About 75.
Q. Mr. Greer, was there any warehouse storing fireworks across from the blast that was still there?
A. Yes, sir.
Q. Were you able to determine the center of the blast right across the street from this warehouse that had any fireworks in it?
A. Yes, sir, right across the street, the blast was located in a structure back west of Rosine Street and the other structure with the fireworks was on the east side of Rosine.
Q. Did you determine if that was the Alco Fireworks warehouse that blew up?
A. I did.

MR. ROLLINS: I believe that's all. (S.F. Pgs. 221-231)

APPENDIX "B"

TESTIMONY OF HON. WILL G. SEARS, CITY ATTORNEY AT THE TIME OF THE ALCO FIREWORKS EXPLOSION, REGARDING THE DEVASTATION CAUSED THEREBY, HIS FINDINGS AND RECOMMENDATIONS, AND THE REASONS FOR THE PREPARATION AND PASSAGE OF ORDINANCE §8941.

MR. ROLLINS: Explain that, Mr. Sears.

A. An explosion had taken place that blew roofs and walls off of surrounding buildings and surrounding buildings caught on fire and there was debris over three or four blocks and bricks and shingles had been blown off of buildings, and the police had the entire area roped off and evacuated when I got there; and the Fire Department had put out the major fires but fires were still smouldering in surrounding houses. . . . and it is hard to explain the devastation that we saw. (S.F. 177, L 2-13).

* * * * *

A. Yes, sir. Well, the former Chief of Police Carl Shuptrine, who was then an inspector, ... and Legal Department Investigator Al Cooper and myself went all through the neighborhood and we found tangled masses of destruction a considerable distance from where the Alco building had been, and either on the 7th or the following date Lt. Cooper and myself returned there, and we took pictures of this mass of debris which was found in the streets, and in the yards and found it considerable distance from where the explosion actually took place. (S.F. 183, L 4-16)

* * * * *

Questions by Mr. Rollins:

Q. Mr. Sears, I believe just before the recess I asked you if you had made a report to Mayor Hofheinz, then the Mayor of the City of Houston, and to the City Council?

A. Yes, sir, I made a written report and a recommendation too.

Q. What was your recommendation?

A. My recommendation to the Mayor was—

MR. WERLEIN: Your Honor, we object what he may have recommended would not be material. It's not shown that he is an authority or an expert on explosions or an authority on pyrotechnics, and if any opinions were based on hearsay it would not be admissible, and for lack of a proper predicate we ask that he not be able to testify to that.

THE COURT: What is the materiality of this?

MR. ROLLINS: To show the circumstances around the enactment of Ordinance 8941, and it is to show that the ordinance is not arbitrary or capricious.

MR. EASTERLING: Well, Your Honor, we have the ordinance itself.

THE COURT: Well, the fact that it has been enacted—

MR. BOULDIN: Your Honor, we think it is admissible for the reason that the Courts have held that the question is if Council acted unreasonable, arbitrary or capricious in passing an ordinance, and we say that it depends on their investigation and also the circumstances existing. And we think it is admissible for that purpose.

THE COURT: Under those circumstances go ahead.

Q. What was your recommendation to Council?

MR. EASTERLING: Please note our exception.

Q. Was it an oral recommendation?

A. I don't remember, I know a recommendation was made to the Mayor and I reported to Council in one of the Council meetings.

Q. I'll show you what has been marked as Defendant's Exhibit No. 14. Can you identify that?

A. Yes, sir.

Q. What is it?

A. That is the report that I made to the Mayor of the investigation of the explosion of the Alco Fireworks and Specialty Company on Rosine Street and prepared by me on June the 8th, 1953, and delivered to Mayor Hofheinz.

Q. Does that contain your recommendations to Mayor Hofheinz?

A. No, sir, it does not.

Q. What does this contain?

A. The findings on the ground at the time, the cause of the explosion, and this report was accompanied by a recommendation, and if this was in writing or not I do not know, but I know that I was instructed by the Mayor and the Council and the Fire Marshal to prepare an ordinance immediately.

Q. Was that ordinance prepared?

A. Yes, sir.

Q. And that was Ordinance 8941?

A. Yes, sir, this is the ordinance which I myself prepared and was enacted by Council a few days following the explosion.

Q. And this ordinance was duly enacted and properly—

MR. WERELIN: We object, Your Honor, the statements of Counsel now is an assumption.

MR. ROLLINS: We will have Mrs. Russell here in the morning to prove this up.

MR. EASTERLING: We do not object to the ordinance but we object to you testifying that the ordinance was based on anything except what it states.

MR. ROLLINS: All right. Mr. Sears, you stated that—

MR. EASTERLING: We object to leading now.

Q. Did you or not make a recommendation to the Mayor?
A. Yes, sir, I did.
Q. What did you recommend to the Mayor?
A. That this ordinance be prepared and enacted by the Council.
Q. That is this Ordinance 8941?
A. Yes, sir.
Q. And you did prepare this Ordinance 8941?
A. Yes, sir.
Q. And you made this report to the Mayor of your findings?
A. Yes, sir.

MR. ROLLINS: We offer it. (S.F. 189, L 17-25; 190, L 1-25; 191, L 1-25; 192, L 1-25; 193, L 1-8).

APPENDIX "C"

MUNICIPAL ORDINANCES OF MAJOR CITIES THROUGHOUT THE UNITED STATES WHICH PROHIBIT THE STORAGE OF FIREWORKS WITHIN THEIR CITY LIMITS.

Birmingham, Ala. [Code, 1923, §1954, 181 So. 906 (Ala. Sup. 1938)]
Dallas, Texas [Pgs. 13-14, supra]
Denver, Colorado [Rev.Mun.Code 224.8]
Fort Worth, Texas [Pgs. 14-15, supra]
Houston, Texas [Ord. #8941]
Milwaukee, Wis. [Milwaukee Code #47-20]
Minneapolis, Minn. [Ord. #661.030]
New Orleans, La. [Fire Prevention Code # 15.01]
Oklahoma City, Okla. [Ord. #30.12.02]
Phoenix, Ariz. [Fire Prevention Code #12.07]
Pittsburg, Pa. [Fire Prevention Code, Art. 13, Sect. 13.3b.]
St. Louis, Mo. [Ord. #49535]
Tulsa, Okla. [Tulsa Rev. Ord. Tit. 14, Sect. 19]